APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

Filed September 28, 1995

DAN WILLBANKS, Plaintiff/Appellant,	)	2 CA-CV 95-0111 Department B
v.	)	MEMORANDUM DECISION
JOHN KECK and ALAMO RANCH CO., Defendants/Appellees.	)	Not for Publication Rule 28(a)(2), Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR
COURT OF COCHISE COUNTY

Cause No. CV 92-07-00375

Honorable Michael J. Brown, Judge

AFFIRMED

Dan Willbanks — McNeal
In Propria Persona

Calvin W. Allred — Willcox
Attorney for Defendants/Appellees

E S P I N O S A, Presiding Judge.

Appellant Dan Willbanks appeals from a judgement following a jury verdict in favor of appellees Alamo Ranch Company Alamo), an Arizona Corporation, and its president John Keck, as well as the trial court's findings of fact and conclusions

of law in which his request for injunctive relief of his nuisance claim was denied. Willbanks raises thirty-five issues on appeal, most of which do not merit discussion.[1] For the reasons discussed below, we affirm.

Facts and Procedural History

Willbanks resides on fifty acres of land, owned by his wife, which has common border with property owned and farmed by Alamo. In May 1992, Alamo employed Irrigation Sales and Services to install a replacement for a nearly twenty-year-old unmuffled pump engine on an irrigation well near the Willbanks' property. The new engine's two mufflers were not installed until about two weeks later and it ran continuously without them during that time. In July, Willbanks filed a nuisance complaint

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1For example, Willbanks raises as issues his own standing to sue; whether the engine noise complained of constitutes a "noise easement" or a "taking" of his property pursuant to Ariz. Const. art. II, Sec. 17; whether a doctrine he repeatedly refers to as *sic utere tuo ut alienum non laedas* applies to a private corporate farmer in Arizona; the public policy regarding the interspersing of private residential property and corporate farming land; the level of sound decibels necessary to constitute a nuisance; and whether he was entitled to sanctions against the defendants and their attorney for failure to observe the quoted Latin maxim and accept Willbanks' settlement offer.

against Southwest Gas Corporation, whom he claimed sold the motor to Alamo; J.D. Stevenson, owner of Irrigation Sales and Services,[2] Alamo President John Keck, and another Alamo employee, Jim Crotts, for damages caused by "a large volume of loud noise" from the new irrigation pump engine. Keck and Crotts filed a motion to dismiss for failure to state a claim and a motion for summary judgement on the ground that reasonable activities are protected from nuisance claims under A.R.S. 3-112. Southwest gas joined the motions, which the trial court granted. The judgement in favor of Southwest Gas was affirmed on appeal, but reversed and remanded as to Crotts and Keck. Willbanks v. Southwest Gas Corp., 2 CA-CV 93-0039 (memorandum decision August 17, 1993).

Between October 1992 and July 1993, Willbanks filed five successive complaints against Alamo, seeking a permanent injunction to prohibit the engine noise from "intrud(ing) upon the land and home of plaintiff" and damages for nuisance, conversion, and taking without just compensation.[3] Over Willbanks' objection, the trial court consolidated the five causes with the first action, finding the issues legally

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2Pursuant to stipulation, Stevenson was dismissed as a defendant.

3Willbanks also filed a sixth complaint against Alamo seeking an injunction prohibiting dogs belonging to an Alamo employee living on the property from trespassing on his land, which was later dismissed at Willbanks' request.

and factually linked.[4]

Trial began on December 6, with the jury to decide the nuisance and damage issues and the court to determine whether to grant injunctive relief. Because Willbanks presented no evidence of damages, the jury was charged with deciding only the issue of whether or not Alamo caused, created, or maintained a private nuisance during the time periods from July 1990 through July 1992, during the two weeks in May 1992 when the new engine ran without mufflers, from May 1992 through September 1993, and from September 1993 through the time of trial. The jury concluded that the defendants had not reasonably interfered with Willbanks' use and enjoyment of the property during any of the time periods. The trial court also reached the same conclusion and denied injunctive relief. The court awarded costs and attorneys' fees to Alamo and Keck.[5]

Consolidation

Willbanks asserts that the trial court "closed the Arizona courts to this

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4We declined to accept jurisdiction of Willbanks' petition for special action review of this ruling, and assessed attorneys' fees as a sanction for bringing a frivolous petition. Willbanks v. Alamo Ranch., 2 CA-SA 93-0114 (September 22, 1993).

5Finding no evidence of Crotts' participation, the court dismissed him as a defendant and Willbanks does not contest this ruling on appeal.

plaintiff" when it consolidated his successive actions for trial. Since all Willbanks' claims involve the same legal issue: whether the noise from the pump engine constituted a nuisance, and most, if not all, the same evidence would be relevant and admissible as to each claim, we can see no abuse of discretion in consolidating the claims, as clearly permitted by Ariz. R. Civ. P. 42(a), 16 A.R.S. Furthermore, Willbanks has demonstrated no prejudice. We note that the court gave the jury separate forms of verdict for the different time frames alleged in Willbanks' various complaints.

Change of Judge

Willbanks also challenges the trial court's denial of his motion for change of judge for cause. Ariz. R. Civ. P. 42(f)(2), 16 A.R.S. The trial court correctly determined that Willbanks' motion, which was based on events that occurred on March 7, 1994, was untimely filed on October 7, 1994. See Ariz. R. Civ. P. 42(f)(2)(C) (motion must be made within twenty days after discovery of grounds for cause). Willbanks further asserts that the court erred in denying his motion for change of judge as of right under Ariz. R. Civ. P. 42(f)(1).[6] However, Willbanks waived this claim when the matter went to trial before the judge he wished to remove. Ariz. R. Civ. P. 42(f)(1)(D); Hickox v. Superior Court, 19 Ariz. App. 195, 505 P.2d 1086 (1973)

6Willbanks previously filed a motion to remove Judge Riley as of right in August 1993 and Judge Brown was then assigned to the case.

(proper method of appealing denial peremptory challenge of judge is special action).

Denial of Injunctive Relief

Willbanks argues that the trial court erred in denying injunctive relief, challenging its findings of fact and conclusions of law. Ariz. R. Civ. P. 52(a), 16 A.R.S. On review, we accept the trial court's findings of fact unless they are clearly erroneous, but we are not bound by its conclusions of law and are free to draw our own conclusions from the facts found by the trial court. Arizona Board of Regents v. Phoenix Newspapers Inc., 167 Ariz. 254, 806 P.2d 348 (1991).

a. Nuisance

A nuisance is defined as "a condition which represents an unreasonable interference with another person's use and enjoyment of his property and causes damage." Graber v. City of Peoria, 156 Ariz. 553, 555, 753 P.2d 1209, 1211 (App. 1988); see also Armory Park Neighborhood Association v. Episcopal Community Services, 148 Ariz. 1, 712 P.2d 914 (1985). In determining whether a nuisance exists, the trial court should consider the totality of the circumstances, including the locality and character of the surroundings, the nature of the defendant's business, the manner in which the business is conducted, the value to the community of the defendant's activities, the defendant's ability to reduce the harm, the priority of use, and the extent to which the defendant would be damaged by an injunction and the

plaintiff would be damaged by the failure to enjoin. McQuade v. Tucson Tiller Apartments, Ltd., 25 Ariz. App. 312,543 P.2d 150 (1975). In determining the reasonableness of the defendant's activities in the surroundings, the court applies a balancing test. Armory Park; McQuade.

Willbanks argues that in concluding that the defendants' interference was not unreasonable, the trial court relied too heavily on the doctrine of "coming of nuisance." The record belies this claim. The court's findings and conclusions clearly reveal that it considered the location and character of the land; the duration of Alamo's business as well as that of the previous owners; how long a well and pump had operated on the property; testimony and its own observations at the site regarding the noise volume of the pump engine;[7] and the defendants' attempt to lessen the volume by installing mufflers.

b. Coming to the nuisance

In a related argument, Willbanks contends that the evidence was insufficient to support consideration of the coming to the nuisance doctrine,

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7The trial court and jury went to Willbanks' property where the jury was instructed to observe the locality and character of the surroundings and the noises that they could hear from the engine and pump. The court and the jury listened to the engine from inside Willbanks' home first with two mufflers and then with the third muffler added.

pointing to his testimony that in 1972 when he purchased his land,[8] "there was no farming going on" on the adjacent property now owned by Alamo. Willbanks admitted, however, that the owner told him he did farm that year, and that there was a pump and engine on the well at the time. Furthermore, Alamo presented evidence that the well had been dug in 1954 and that the land had been farmed and irrigated since the early 1950's, although there were periods when the fields lay fallow and were not irrigated. The evidence was sufficient for the trial court to consider that Willbanks "came to the nuisance."

c. Constitutionality of A.R.S. Sec. 3-112

Willbanks next claims that A.R.S. Sec. 3-112[9] is unconstitutional because it

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8Willbanks subsequently deeded the property to his wife several years before this action, but failed to disclose this to the defendants or the court until after closing arguments.

9A.R.S. Sec. 3-112. **Agricultural operations; nuisance liability.**
A. Agricultural operations conducted on farmland that are consistent with good agricultural practices and established prior to surrounding nonagricultural uses are presumed to be reasonable and do not constitute a nuisance unless the agricultural operation has a substantial adverse effect on the public health and safety.
B. Agricultural operations undertaken in conformity with federal, state and local

effectively grants immunity from nuisance suits to farmers. We disagree. Section 3-112 merely creates a statutory presumption that, under certain circumstances, agricultural operations are reasonable and do not constitute a nuisance. In evaluating an analogous presumption under A.R.S. Sec. 12-567(M), our supreme court stated:

> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of the fact from either the court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents.

Eastin v. Broomfield, 116 Ariz. 576,580, 570 P.2d 744, 748 (1977), quoting Meeker v. Lehigh Valley Railroad Co., 236 U.S. 412, 430, 35 S. Ct 328, 335, 59 L. Ed. 2d 644, 657 (1915). See also State v. Church, 175 Ariz. 104, 854 P.2d 137 (App. 1993) (statutory presumption merely shifts burden of proof). The same is true here; thus, Sec. 3-112 is not constitutionally infirm.

d. Sufficiency of the evidence

Willbanks further contends that the evidence was insufficient to support the

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laws and regulations are presumed to be good agricultural practice and not adversely affecting the public health and safety.

court's conclusion that there was no unreasonable interference with Willbanks' use of the property. Viewing the evidence in the light most favorable to sustaining the court's findings, we will sustain them unless they are clearly erroneous or unsupported by any credible evidence. Federoff v. Pioneer Title and Trust Co. of Arizona, 166 Ariz. 383, 803 P.2d 104 (1990). We have reviewed the record in light of Willbanks' allegations and fine it contains ample credible evidence to support the court's findings, including evidence that the new engine was quieter than the old one in use between 1976 and 1992, and the court's first-hand observation that the current noise was less pronounced than that of Willbanks' refrigerator. Accordingly, the trial court did not err in denying Willbanks' request for injunctive relief.

Jury Instructions

Willbanks argues that the trial court erred in giving certain jury instructions and refusing his proffered instructions. On appeal, "[j]ury instructions are viewed as a whole, with an eye toward determining whether or not the jury has been given the proper rules to apply in arriving at its decision." Catchings v. City of Glendale, 154 Ariz. 420, 424, 743 P.2d 400, 404 (App. 1987). We will not overturn a jury verdict because of instructions that were given unless there is a substantial doubt as to whether the jury was properly guided in its deliberations. Id.

Contrary to Willbanks' assertion, the trial court's instruction that a corporation can act only through its employees and is responsible for the acts

of its employees done within the course and scope of their employment is a correct statement of law. Miller v. Arnal Corp., 129 Ariz. 484, 632 P.2d 987 (App. 1981). Willbanks further argues that the court erroneously instructed the jury to consider Sec. 3-112, claiming that the instruction required the jury to find for Alamo. As discussed above, Sec. 3-112 merely creates a statutory presumption, which Willbanks had the burden to rebut. He also challenges the court's instructions on "reasonableness," "unreasonableness," the "balance of convenience" test, and "coming to the nuisance." These were legally correct instructions on the law of nuisance. See Armory Park; Spur Industries Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972); Graber; McQuade. They were also supported by evidence.

Our review of all the instructions given shows that the jury was properly charged; therefore, the trial court did not err in refusing Willbanks' instructions. See Durnin v. Karber Air Conditioning Co., 161 Ariz. 416, 778 P.2d 1312 (App. 1989).

Finally, although appellees challenge Willbanks' standing to sue as well as bring this appeal, based on his untimely disclosure at the end of the trial that he no longer had any ownership interest in the property, appellees did not cross-appeal from the trial court's implicit denial of their motion for a mistrial on this basis. Consequently, we do not reach this issue. Ariz. R. Civ. App. P. 13(b), 17B A.R.S.; Larkin v. State ex rel. Rottas, 175 Ariz. 417, 857 P.2d 1271 (App. 1992).

The rulings of the trial court are affirmed. Appellees are granted their costs and attorneys' fees on appeal pursuant to Ariz. R. Civ. App. P. 21(c) and 25, 17B A.R.S. See Johnson v. Brimlow, 164 Ariz. 218, 791 P.2d 1101 (App. 1990).

/S/Philip G. Espinosa
Philip G. Espinosa
Presiding Judge

CONCURRING:

/S/William E. Druke
William E. Druke
Chief Judge

/S/James D. Hathaway
James D. Hathaway
Judge 1

APPENDIX B

(Filed October 20, 1995)

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

October 20, 1995

RE: WILLBANKS v. CROTTS/ALAMO RANCH
2 CA-CV 95-0111

Cochise County Superior Court Cause No. CV 92-07-00375

The following action was taken by the Court of Appeals for the State of Arizona, Division Two, Department B on October 19, 1995,

ORDERED: Motion for Reconsideration is DENIED.

It appearing Petition for Hearing En Banc is not provided for under the rules of appellate procedure,

FURTHER ORDERED: Petition for Hearing "En Banc" is DENIED.

Presiding Judge Espinosa, Chief Judge Druke and Judge Hathaway participated in the determination of this matter.

JOYCE A. GOLDSMITH, Clerk

Copy To:

Dan Willbanks
5158 W. Buford Lane
McNeal, Az 85617
(sent certified mail)

LAW OFFICE OF CALVIN W. ALLRED
151 S. Haskell
Willcox, AZ 85643

APPENDIX C

SUPREME COURT
State of Arizona

Noel K. Dessaint, Clerk of Court
Kathleen E.Kempley, Chief Deputy Clerk

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone: (602) 542-9396

April 25, 1996

RE: DAN WILLBANKS vs. JOHN KECK/ALAMO RANCH CO.
Supreme Court No. CV-95-0501-PR
Court of Appeals No. 2 CA-CV 95-0111
Cochise County No. CV 92-07-00375

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 23, 1996, in regard to the above-referenced cause:

ORDERED: Petition for Review by Supreme Court of Arizona = DENIED.

Record returned to Court of Appeals, Division Two, Tucson, this 25th day of April, 1996.

NOEL K. DESSAINT, Clerk

To:

Dan Willbanks
Calvin W. Allred, Esq.
Joyce A. Goldsmith, Clerk, Court of Appeals Division Two, Tucson
Lexis-Nexis
West Publishing Company

jls

APPENDIX D

ARIZONA SUPERIOR COURT, COCHISE COUNTY

(Filed December 8, 1994)
Judge: HONORABLE MICHAEL J. BROWN
CASE NO. CV 92-07-00375

Court Reporter: None
DATE: December 8, 1994

DAN WILLBANKS, Plaintiff ( )

vs. ( )

ALAMO RANCH COMPANY, et al. ( )

Defendants ( )

EVENT SUMMARY

Type: in chambers ruling on
Result: completed
Type: plaintiff's request for
Type: injunction

M I N U T E E N T R Y

IN CHAMBERS:
Parties are not present.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1) The plaintiff, Dan Willbanks, and defendant, Alamo Ranch Company, an Arizona corporation, own properties next to each other in the southern end of the Sulphur Springs Valley near McNeal, Arizona in Cochise County.

2) The Alamo Ranch Company property has been farmed regularly and continuously since 1954. During all that period of time, it has been farmed as irrigated property and the pump has been operated by an internal combustion engine. From time to time during that forty-year period, the farm has lain fallow either because it was not profitable to operate that particular year or because it was best for the land that it lie fallow (see Leviticus). Nevertheless, at all times it clearly was a farm with an existing well, water tank, pump and engine.

3) The defendant, Alamo Ranch Company, purchased the property in 1976 and included in the purchase was an unmuffled Caterpillar engine on the irrigation pump and a pivot sprinkler system.

4) From a distance of twenty-five feet the Caterpillar engine produced a decibel rating in the high seventies to mid-eighties. The defendant, Alamo Ranch Company, operated the irrigation pump with that Caterpillar engine from 1976 until 1992 when it wore out and was replaced.

5) On or about May 8, 1992, the defendants replaced the Caterpillar engine with a Teco Crusader engine. They ran that engine unmuffled for approximately twelve days until the mufflers were delivered.

6) On or about May 20, 1992, a double muffler was installed on the Teco Crusader engine, after which it produced significantly fewer decibels than did the Caterpillar which preceded it. Plaintiff filed his first lawsuit against these defendants on July 6, 1992; his initial lawsuit was followed by several others, all of which have been consolidated for the purposes of this trial. They include prayers for damages and for injunctive relief.

7) It was understood and agreed before trial that the jury would decide the legal issues (i.e., damages) whereas, the Court would decide the equitable issues (i.e., injunctive relief).

8) Both the plaintiff and his wife testified they could not tell any difference between the noise produced by the Caterpillar engine and the Teco engine with the two mufflers installed. They both acknowledged that the addition of the third muffler in September 1993 made the Teco engine even quieter.

9) The Court and the jury viewed the site and listened to the engine, both in its double muffler stage and its three-muffler stage from various spots on the plaintiff's property adjacent to the defendant's property and from inside the plaintiff's home, both in the living room and bedroom. It was the Court's observation that the noise produced by the plaintiff's refrigerator inside his home was more pronounced than any noises from the defendant's engine or pump

either with two mufflers or three mufflers.

THE COURT CONCLUDES that there is not now nor has there been since 1990 (or 1976) any unreasonable interference with plaintiff's use of the property in question by the defendants' operation of their pump or engines, whichever make they may have been.

THE COURT FURTHER FINDS that injunctive relief is not justified.

IT IS THEREFORE ORDERED that the plaintiff's request for injunction is denied.

Defendant shall have judgement against plaintiff for his costs incurred herein.

cc: Honorable Michael J. Brown
Court Administrator - Pima County
Pima County Superior Court - Martha Myhre
Dan Willbanks - 5158 W. Buford Lane, McNeal AZ 85617
Calvin Allred, Esq. - 151 S. Haskell Ave., Willcox AZ 85643
Clerk of the Court, Cochise County - P.O. Drawer CK, Bisbee AZ 85603 (original)

Linda McCormick
Deputy Clerk

/S/Michael J. Brown
Michael J. Brown
Judge